PP

v.

MOGAN SUBRAMANIAM

HIGH COURT MALAYA, PULAU PINANG
RK NATHAN J
[CRIMINAL TRIAL NO: 45-8-2001]
30 MARCH 2004

CRIMINAL PROCEDURE: *Police investigation - Cautioned statement - Statement made by accused in Tamil - Statement recorded by recording officer in Bahasa Malaysia - Statement read back to accused in Bahasa Malaysia and thereafter translated to him in Tamil - Recording officer failing to record such facts - Recording officer failing to record that he translated statutory warning to the accused in Tamil - Whether cautioned statement of accused ought to be accepted by court*

EVIDENCE: *Statement - Cautioned statement - Failure to record whether statutory caution translated to accused - Failure to record whether statement read back to accused in the language in which he made it - Whether such statement ought to be accepted by court - Criminal Procedure Code, 112(5)*

CRIMINAL PROCEDURE: *Prosecution - Duty of prosecution officer - Person named by accused for first time when making defence - Whether incumbent upon prosecution to record statement from such person or to commence further investigations against such person*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Failure of chemist to testify as to amount he had taken as sample for analysis - High Court unable to ascertain if chemist had complied with s. 37(da)(1) - Whether charge ought to be reduced and amended to one under s. 12(2) punishable under s. 12(3) - Dangerous Drugs Act 1952, ss. 12(2),(3), 37(da)(1)*

The accused was initially charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts were that the accused was ambushed by a police party as he was riding his motorcycle. Upon his path being obstructed, the accused fell down together with his motorcycle and was arrested as he was trying to get up. The police recovered a packet containing drugs inside a plastic carrier bag in the metal basket attached to the

motorcycle. There was a yellow piece of cloth tied to the basket. The police failed to take possession of this cloth as an exhibit. The accused gave a statement in Tamil which was recorded in Bahasa Malaysia. The recording officer claimed that he had read back the statement to the accused in Bahasa Malaysia before translating it to him in Tamil. This fact, however, was not recorded in the statement. The recording officer also failed to record the fact that he had translated the statutory warning to the accused in Tamil. The chemist failed to give evidence as to the percentage or weight of the sample of the seized drugs that he took for purposes of analysis. In his defence, the accused claimed that his motorcycle was also used by his two brothers as well as by two of his friends named Raja and Suresh. He further claimed that on the day he was arrested, he had intended to go to a temple. His friend Raja had used his motorcycle earlier that day. The accused claimed that it was raining at the material time. He saw the yellow piece of cloth tied to the motorcycle basket but nothing else. He denied knowledge of the plastic bag in the motorcycle basket, which the defence alleged was obstructed from vision by the yellow cloth.

Held (convicting the accused on an amended charge of possession under s. 12(2) punishable under s. 12(3) of the Act):

[1] Since the cautioned statement did not show that the recording officer had indeed translated the statutory warning into Tamil, the cautioned statement ought to be rejected. If indeed the recording officer had read the statement back to the accused in Bahasa Malaysia before translating it to him in Tamil, this ought to have been recorded. The recording officer should have taken greater care to ensure that everything he said he did, was recorded. His neglect constituted a failure to comply with the statutory requirement under s. 112(5) of the Criminal Procedure Code. (pp 518 h & 519 a-d)

[2] Since the chemist had not testified as to the amount he had taken as sample for analysis – as conceded by the prosecution - the High Court was unable to ascertain if the chemist had indeed complied with s. 37(da)(1) of the Act by taking the minimum amount. The charge was therefore reduced to one under 12(2) of the Act and the accused was called upon to enter his defence. (p 520 d)

[3] The main question was whether the accused had knowledge of the drugs in the plastic bag in the motorcycle basket which was allegedly covered by the yellow piece of cloth tied to the basket. There was evidence that it was raining on the material day. The plastic bag was not a small bag

and the piece of yellow cloth could not have covered the entire motorcycle basket. Rain water would have also soaked the cloth and could not have totally covered the plastic bag. There was therefore doubt as to the innocence of the accused. (p 523 a-c)

[4] The prosecution could not be faulted for not taking a statement from Raja based on the defence suggestion that Raja and the others had used the motorcycle belonging to the accused. This was because the accused had not raised the issue of Raja at the outset. To expect the prosecution to do so would result in an unnecessary burden on the prosecution, unnecessary expenses to the tax-payer and unnecessary delay in the trial. The High Court would also draw an inference that the accused was in custody or control of the plastic bag in the motorcycle basket since he was the owner of it and riding it at the material time. (p 523 f-h)

Case(s) referred to:
Lee Koh Eng v. PP [1975] 1 MLJ 132 ***(refd)***
Ng Yin Kwok & Ors v. PP [1989] 3 MLJ 166 ***(refd)***
PP v. Chia Leong Foo [2000] 6 MLJ 705 ***(foll)***
PP v. Poh Ah Kwang [2003] 3 AMR 664 ***(refd)***
PP v. Tan Hock Beng [2002] 3 CLJ 177 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112(5)
Dangerous Drugs Act 1952, ss. 12(2), (3), 37(da)(1), 39A(2)(a), 39B(1)(a)

For the PP - Anuar Abdul Rahman DPP
For the accused - K Kumaraendran (Dev Kumaraendran); M/s Kumar & Co

Reported by Andrew Christopher Simon

JUDGMENT

RK Nathan J:

The Charge

The accused faced the following charge:

> Bahawa kamu pada 29 Jun 2000, jam lebih kurang 7.30 petang, bertempat di Jalan Tingkat Limbungan 2, Chain Ferry, Butterworth, di dalam Daerah Seberang Perai Utara, dalam Negeri Pulau Pinang telah mengedar dadah berbahaya, iaitu 59.84 gram heroin, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980), yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Findings Of The Court

The first witness for the prosecution was the police photographer. From the outset the defence began laying the foundation for its case. Counsel pointed to a photograph showing the basket attached to the motorcycle in which the packet containing heroin was found inside a plastic carrier bag which the defence subsequently contended was covered by a yellow cloth which Hindus use as an offering to put on the Deity they are praying to. This yellow cloth which assumed so much significance later was treated with indifference by the prosecution so much so that it was not even tendered as an exhibit but which was left to rot and wither away in the sun and rain still attached to the basket attached to the motorcycle and which motorcycle was identified as an exhibit. When this photographer was asked what that yellow cloth was, he said he did not know. The 2nd witness called was an officer from the registrar and inspector of motor vehicles who testified that from his records the accused owned the said motorcycle.

The 3rd witness was chief inspector Sahran who led the raiding party. Having briefed his group of raiding officers they went to the Butterworth Police Station where he recruited further officers to assist in the ambush. He then organised the officers into four groups and set up the ambush. He and his group were in his car. He then noticed a Yamaha motorcycle number PEM 9861 being ridden. He then drove up to the front of the motorcycle and rushed towards the motorcycle shouting "Polis jangan lari". The motorcycle fell down with the motorcyclist. He then arrested the rider with the help of the officers in his car when the motorcyclist tried to get up to flee. He then examined the motorcycle and found a plastic bag with the name 'Clara International' and inside it was a package wrapped in Chinese newspaper containing what he suspected to be heroin. This plastic bag marked 'Clara International' was inside the basket attached to the motorcycle. He identified the accused as the rider of the motorcycle after finding the accused's identity card in his pocket which he searched after the arrest. When he identified himself as the Polis and when he arrested him the accused looked frightened. He then took possession of the said motorcycle, the key to it and the helmet the accused was wearing at that material time. He then returned to the head quarters and handed over the accused and all the exhibits to the investigating officer of the case.

He further explained that when he blocked the path of the motorcycle with his car the accused was unable to control the motorcycle and fell with it beside the fence on the road with the motorcycle leaning towards the fence and the rider still on the motorcycle. He confirmed that the arrest was made when the accused was still seated on the motorcycle. As for the yellow cloth in the basket of the motorcycle he believed it to be a 'tangkal' that is something

like a talisman. He denied a suggestion under cross that the said yellow cloth was not tied to the basket. He admitted not taking possession of the said yellow cloth because it looked like a talisman belonging to a different religion and in his view that yellow cloth had nothing to do with the case.

Under further cross-examination he admitted that when he obstructed the path of the motorcycle, the said motorcycle collided into his car. He denied the suggestion that the motorcycle fell on the road and not on the grass verge beside the fence as he had said earlier. At this stage counsel pointed to scratch marks on the helmet worn by the accused and suggested that those scratch marks had indeed been caused by the accused falling on the road. This of course was denied by the witness. When shown the key and sketch plan the witness agreed that the investigating officer who drew the sketch plan had indeed marked the place of arrest as X and that it was marked as being on the road proper. When it was put to him that the investigating officer would not know where X was unless he had pointed it out to him this witness again denied this suggestion. He denied a suggestion that the plastic bag bearing the word 'Clara International' was not visible as it was hidden underneath the yellow cloth.

At this stage defence counsel attempted to tender a piece of yellow cloth as a defence exhibit to show that the said cloth was something similar to the one in the basket. However this court viewed the motorcycle and had recorded in the notes that the yellow cloth tied to the basket in the motorcycle is much much smaller than the one tendered as a defence exhibit. Under re-examination he confirmed that the yellow cloth tied to the motorcycle did not hide or cover the 'Clara International' bag which contained the package of heroin.

The next witness SP4 was the Government Chemist. He subjected the drugs to the" standard four-pronged test and determined that the drug was heroin and that its weight was 59.84 grams. There was not much serious challenge to this witness except that he agreed there was no request from the investigating officer for him to have lifted finger prints from the package nor were any finger-nail clippings of the accused sent for analysis to ascertain the presence of heroin in the finger-nails.

The next witness (SP5) was chief inspector Balachandran who recorded a cautioned statement from the accused. Upon challenge being taken as to its voluntariness I ordered a trial within a trial to commence to determine the voluntariness of the cautioned statement.

SP5 who become TW1 for the trial within a trial, testified that before recording the cautioned statement he had examined the accused to ascertain if there were any injuries. Except for the fact that prior to this incident the accused had sustained an injury to his leg as a result of a motor accident, the accused had no other marks or injuries. The accused too did not complain to him of assault prior to the recording. The accused and he conversed in the Tamil language and there was no difficulty understanding each other. He then read out the statutory caution as stated in s. 37A(1)(b) of the Act to the accused. He confirmed that the accused understood the caution by explaining to the accused the statutory caution in Tamil and the accused told him that he understood the explanation. Before recording the statement he confirmed that he had made no promise or threat or gave no inducement for the accused to make the statement. He had also satisfied himself by asking the, accused if anyone else had made any promise, threat, or given any inducement to enable him to make the statement arid the accused had informed him that no one else had done so. The accused was normal when giving the statement. After recording the statement he read it back to the accused in Bahasa Malaysia. He then translated into Tamil the contents of the statement in Bahasa Malaysia. He then asked the accused if he wished to alter, amend or add to the statement and the accused had said that he did not want to do so. Both the accused and he then signed the cautioned statement. Under cross-examination he denied a suggestion that the accused had informed him that at that material time he was on medical leave. He also admitted that he had not recorded the fact that he has translated the statutory warning to the accused in Tamil. Although he had asked the accused when he was arrested, he had not recorded that fact in the cautioned statement. The next witness at this stage was TW2 the policeman who took the accused to TW1 to record the statement and who subsequently after the recording, had sent the accused back to the lock-up. For reasons best known only to himself the learned deputy called as his third trial within a trial stage witness, a policeman who was at the scene of arrest. As soon as counsel objected as to the relevance of this witness giving evidence relating to another cautioned statement having been given by the accused to the arresting officer, the learned deputy then indicated that he was not pursuing that line of questioning. What is relevant was that this witness testified that the accused was actually limping (kaki OKT dalam capek macam kecederaan kaki).

I accepted counsel's submission that since the cautioned statement did not show that TW1 had indeed translated the statutory warning in Tamil, I ought to reject the cautioned statement. The officer spoke to the accused in Tamil to ascertain that each understood the other before the recording commenced. The officer

said that after recording the evidence he again read it back in Bahasa Malaysia and then translated the same to the accused in Tamil. If this was done then it ought to have been so recorded. The accused is facing capital punishment. The recording officer should therefore have taken greater care to ensure that everything he said he did, was recorded. I view this neglect of this officer as a failure to comply with s. 112(5) of the Criminal Procedure Code (the CPC) which reads as follows:

> A statement made by any person under this section whether or not a caution has been administered to him under subsection 113(1) shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, **after it has been read to him in the language in which he made it** and after he has been given an opportunity to make any corrections he may wish. (emphasis provided)

It is relevant to note therefore that there is a statutory requirement on the part of the recording officer to read back the statement to the maker "in the language in which he made it" before he signs it. I had no hesitation therefore on this ground alone to refuse to admit the cautioned statement into evidence.

The next witness called was the store keeper of the police station where the exhibits were kept and produced at trial. SP6 was the investigating officer. He confirmed having received all the exhibits together with the accused from the arresting officer.

Under cross-examination he confirmed that he was informed of the arrest and of the place of arrest by the arresting officer (SP3). He also confirmed seeing the yellow cloth tied to the basket in the motorcycle as shown in the police photograph. He also agreed that the sample yellow cloth tendered as a defence exhibit was similar to the one he had seen in the basket of the motorcycle. He also admitted that he did not go to the accused's house nor did he make a search of the house. He also did not know that there were four other occupants in that house.

He also did not know that the accused's friends also used the same motorcycle for their own purposes.

Under re-examination he testified that the reason he did not search the house nor go to the house of the accused was because the arrest was not made in the house but outside on the road and far away from the house. With this witness the prosecution closed its case and offered ten witnesses to the defence. Counsel indicated that he did not need any of the said witness.

Submission Of No Case To Answer

The only issue taken by the defence at this stage was that the Chemist had not indicated either in his oral evidence or in his Chemist's report the percentage or the weight of the sample of the seized drugs that he took for the purposes of analysis and relied for this proposition upon a case decided by this court. In *PP v. Poh Ah Kwang* [2003] 3 AMR 664 I had held that in the case of methamphetamine tablets where the total weight of the 3,230 pills was found to be 332 grams, the taking of only 16.527 grams of the total weight of the drugs seized from the accused fell far short of the statutory limit of 50 grams that ought to have been analysed under s. 37(da) XVI of the Act. Similarly in this case the total weight of the heroin seized was 59.84 grams. According to s. 37(da)(1) of the Act, the minimum amount to be found in possession is 15 grams for the presumption of trafficking to arise. Therefore since the Chemist had not testified as to the amount he had taken as sample for purposes of analysis (and also as conceded by the Prosecution in it's submission) the court was unable to ascertain if the Chemist had .indeed complied with s. 37(da)(1) of the Act by taking the minimum amount. In the circumstances I reduced the charged to one under s. 12(2) of the Act and called upon the accused to enter into his defence.

After I had called for the defence and fixed another date for continuation, counsel for the accused addressed me on the next date, requesting that I review my decision to call for the defence on the reduced charge. On hind sight he decided not to pursue this line at this stage and indicated he might wish to take this point at the close of the case for the defence.

The Defence

The accused elected to give his evidence under oath. He testified that on 17 August 1999 he had met with a motor accident and as a result of which he sustained a fractured leg and received treatment up to 27 July 2000. He had bought the motorcycle in question on 2 March 2000, However he did not always use the said motorcycle because of the injury he had sustained. The said motorcycle was also used both by his elder and younger brothers as well as by his two friends named Raja and Suresh.

He related the incident of the eventful day. His friend Raja had informed him that he would take him to the Temple that evening. He testified that because of the accident he had made a vow to go to the Temple every Thursday to pray. That being a Thursday, Raja agreed to take him as he found it difficult to ride the motorcycle because of the injury. He woke up at 10am that morning and found no one at home and his motorcycle was also missing. He bathed, had his lunch, watched the television and dozed off and woke up at 6pm. His

mother was then back and she informed him that Raja had borrowed the motorcycle and had returned it with the key and had stated he would come at 7pm to take him to the Temple. Since the Temple would close by 8.30pm. and since Raja had not turned up, he told his mother that he would ride the motorcycle slowly and go to the Temple. His mother then gave him the key and a rain coat as it was raining. He wore the rain coat and went to take his motorcycle, which was parked outside the house. It is important to note that according to him it was raining at that material time. He saw the yellow cloth which was similar to the one which he had tendered as an exhibit. He did not see anything else including the 'Clara International' bag, inside the basket of the motorcycle. When he was nearing the Temple a motorcar coming round a bend collided into his motorcycle. He fell and the said motorcycle fell on his leg. The helmet too fell onto the ground and the scratch marks on the helmet were caused by the fall on the road. He did not attempt to run after having fallen. Three persons alighted from the motorcar. He thought they were coming to help him. Instead they identified themselves as police officers. They lifted up the motorcycle and handcuffed him. The police then showed him the plastic bag 'Clara International' and asked him what it was and he replied he did not know. He identified P8 as the 'Clara International' plastic bag which the police showed him. When asked whose it was, he said he did not know. Both Raja and Suresh stayed in the same kampung. Raja's house was about 150 meters from his house. When the police showed him P8, that was the first time he had seen it.

Under cross-examination he denied the suggestion that his leg injury had healed. On the material day he only saw the yellow cloth tied to the basket of the motorcycle. He denied the suggestion that on the material date he was involved in the trafficking of drugs.

The next witness was the accused's mother. She confirmed that the accused had earlier met with a motorcycle accident and was on medical leave on the day of his arrest. On the eventful day she went for a wedding at 9am. When she returned home at 2pm the motorcycle was not at home. At about 6.30pm Raja returned the motorcycle and confirmed that he would return at 7pm to take the accused to the Temple and asked him to be ready. Her son waited till 7.30pm and since Raja had not come, her son told her that he would ride the motorcycle slowly and go to the Temple, since the Temple would close by 8.30pm. When the accused left the house it was raining moderately. She handed the accused the key to the motorcycle and a rain coat. At about 12 midnight she was informed of her son's arrest. Raja also stayed in the same kampung. She confirmed that Raja and Suresh both used her son's motorcycle.

At the close of the case for the defence, Kumaraendran urged the court that in the light of the authorities, even if this court did not believe the accused's story, but so long as there was a doubt in my mind I must acquit the accused. I agree and accept such a proposition as trite law.

Re-assessing the facts of the case counsel pointed out that I ought to reject the contention of the prosecution that the accused attempted to flee because of the evidence of PW3 the arresting officer of the party who said that the accused had fallen near the fence whereas the key and sketch drawn by the investigating officer, obviously based on information provided by the PW3, showed the position marked X (where the accused fell) , as being on the road. To my mind it does not matter whether the accused fell near the fence, on the grass or on the road. The main question is did he have knowledge of the drugs in the 'Clara International' plastic bag which was in the basket of the motorcycle and which was alleged to have been covered or obstructed from vision by this yellow cloth tied to the basket.

It is true that PW3 did not take possession of this yellow cloth. He believed at that time that the said yellow cloth was a talisman (tangkal) and as it was the belief of another religion he did not take possession of it as he believed it had nothing to do with the case.

Certainly the investigating officer was wrong in this assumption. He ought to have taken possession of this yellow cloth. However when the court visited the place where this motorcycle was stored there was this yellow cloth tied to the basket but because of the years of lying in the sun and rain it looked faded, torn and tattered. In any case I would not have considered it as an exhibit even if I was asked to take note of it since it was not officially taken possession of and therefore it could not be proved to the satisfaction of the court that it was the same yellow cloth that was in the basket from the date of arrest. However the defence tendered a yellow cloth which it said was similar to the one tied to the basket. Since the prosecution failed to take possession of the actual yellow cloth, in fairness to the defence I accepted their yellow cloth as being similar to the one that was there on the date of arrest.

This one-meter piece of yellow cloth will play the most important part in the conviction or acquittal of the accused. It is common ground that one end of the cloth was tied to the basket. Although neither counsel led evidence as to why one end was tied, the answer is obvious. This yellow cloth which is used for prayers by Hindus and which was produced by the defence is light and flimsy. The obvious reason to tie one end to the basket is to prevent it from flying off from the basket when the motorcycle is travelling at speed.

There is evidence that on the material day and time it was raining although moderately. I have seen the 'Clara International' plastic bag P8. It is not a small bag. This cloth is about a meter long. Surely it could not have covered the entire basket because the accused testified that other than the yellow cloth he saw no other 'benda' in the basket. Besides it was raining at that time and the rain water would have soaked the cloth and the cloth therefore could not have totally covered the 'Clara International' bag which would therefore have been visible. Both he and his mother testified that Raja had used the motorcycle earlier. If the accused had seen the bag which I find he must have, he could have said that he assumed it belonged to Raja. But when he denied seeing this bag which is not small, and which could not have been covered totally by this one meter long flimsy yellow cloth, then there no longer arises a doubt as to his innocence. Further he was riding the motorcycle for one and a half kilometers. Surely during the course of that journey this flimsy cloth would have been flying and flipping away exposing this bag. At least the accused could have seen it and explained to the court that he believed it to belong to Raja and since he was on his way to the Temple which was about to close, he had intended to check with Raja on his return but before that he was arrested, this court could have easily accepted that explanation. But to totally deny seeing that bag at all in the basket is a story that does not at all cast any doubt in my mind.

Further, the moment he was arrested and when asked specifically to whom it belonged he could have said, "Raja was the last person to have used the motorcycle, ask him," and this statement could have been tendered to exculpate him.

Counsel then submitted that since Raja was the last person to have used the motorcycle the prosecution ought to have, even after the trial had commenced and after the defence had made the suggestion that others including Raja had used the motorcycle, taken a statement from Raja. I do not think that in this case the prosecution could be faulted for not doing so. As I said if the accused had raised the issue of Raja at the outset, as he ought to, and if the Prosecution then failed to take a statement, that is not correct. If what the defence submits is to be taken as correct then each time the case proceeds and each time the accused raises an issue, it would become incumbent upon the Prosecution to ask for a stay of proceedings and to investigate the case further. This is against the principle of bringing a prosecution to an end expeditiously. Acceding to the accused's argument would be placing an unnecessary burden on the prosecution, unnecessary expenses to be met by tax-payers and unnecessary delay in the trial.

I know there are authorities which suggest that the prosecution can investigate. In *Ng Yin Kwok & Ors v. PP* [1989] 3 MLJ 166 the prosecution carried on with the investigation, also in a drug related case, during the course of the trial. This issue arose out of the investigation relating to certain exhibits which were documents consisting of bills in respect of hotel rooms, copy of visa voucher and registration card of a hotel in Bangkok. The investigating officer commenced investigation of the case on the date of the arrest. After the trial had commenced the said investigating officer was instructed to go to Bangkok to carry out further investigations into the case. He carried out investigations into the initials appearing on one of the exhibits and found that the maker of the initial "CW" had since left the employment of the hotel in question. Another initial "OIL" was found to be that of a female typist who had also left the services of the hotel. These witnesses were unable and unwilling to come to Malaysia to testify. Defence counsel objected to such investigations having been conducted after the case had begun. The Federal Court held that there was, no basis for any objection since the investigation was in fact for the limited purpose of procuring witnesses to tender exhibits in court which exhibits were already in the possession of the prosecution and further that they had in fact already by then been tendered in court for identification.

This court was invited by Kumaraendran to hold it against the prosecution for failing to investigate Raja and Suresh and the two brothers who had also used the motorcycle earlier based on the above stated authority. I do not think I can proceed to hold that this case is authority for the proposition that it is incumbent upon the prosecution to, mid way during trial, commence investigations in every case where the defence raises an issue. In *Ng Yin Kwok* the prosecution had to produce the two witnesses because of the exhibits relating to them which had already been tendered in court and without whom such exhibits would no longer be court exhibits as not having been properly tendered. So the prosecution was duty bound to show that all efforts to get the said witnesses had been made.

In *PP v. Chia Leong Foo* [2000] 6 MLJ 705 Augustine Paul J (as he then was) in analysing the evidence in respect of a similar situation said at p. 726 as follows:

> The white bag containing the dangerous drugs was in the carrier of the motorcycle. It was therefore clearly visible to the accused. He was the owner of the motorcycle. He was riding it at the material time. He was therefore in charge of the motorcycle. These facts lead to the inference that he was in custody or control of the white bag in the carrier of the motorcycle. I must add that it may not be possible to draw such an inference if he was not the owner of the motorcycle.

I therefore drew a similar inference since the accused herein was also the owner of the motorcycle.

The question remains whether the prosecution ought to have called Raja or at least whether it ought to have taken a witness statement from him. The answer to this question lies on whether the court finds that there is a gap in the prosecution's case for failing to call that material witness. As to whether Raja is a material witness to this case, from whom a statement ought to have been recorded could be best assessed upon analysing the totality of the evidence before the court. At no stage during the investigations had the accused linked Raja to this case. When he was arrested he never informed the arresting officer that Raja was the last person to have used the motorcycle. Further if he had mentioned Raja in his cautioned statement, he could had, even after the cautioned statement had been rejected by the court, pointed to the fact that the existence of Raja had already been established to have warranted a statement being recorded from him. The defence merely brought up the issue of Raja's existence only during the trial. I was therefore not prepared to hold that there was a duty upon the Prosecution at that stage to re-commence further investigations.

In the circumstances I found the accused guilty of the amended charge.

Application To Further Re Amend The Charge After Court Found Accused Guilty Of The Amended Charge

On the day fixed for sentencing, Kumaraendran for the accused applied to further amend the amended charge upon which this court had found the accused guilty. Counsel pointed out that since the charge was amended to s. 12(2) the punishment section ought to be s. 12(3) and not 39A(2) of the Act. Section 12(2) reads as follows:

> No person shall have in his possession, custody or control any dangerous drug to which this Part applies unless he is authorized to be in possession, custody or control of such drug or is deemed to be so authorized under this Act or the regulations made thereunder.

The punishment s. 12(3) reads as follows:

> Any person who contravenes the provisions of sub-section (2) or this section shall be guilty of an offence against this Act a.nd shall be liable on conviction to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both.

The punishment s. 39A(2)(a) reads as follows:

> Every person found guilty of an offence against this Act where the offence is not punishable with death and where the subject matter of the offence is:
>
> (a) 5 grammes or more in weight of heroin;
>
> shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

Counsel submitted that the punishment section ought to be s. 12(3) and not s. 39A(2) of the Act.

Firstly as to whether I had the power to further amend at this stage of the proceedings, counsel submitted that since I had not as yet passed sentence, I was not *functus officio* and that I could still amend.

In reply the learned deputy referred to the case of *Lee Koh Eng v. PP* [1975] 1 MLJ 132. It is necessary to look into the facts of this case to see if it is relevant to the case before me. In *Lee Koh Eng* the appellant was tried on a charge of murder. After the Learned Judge had summed up at the end of the trial, the jury retired and subsequently returned and the foreman announced that they found the appellant guilty by a majority of 4 to 3. The learned judge then directed the jury to retire for another try at an acceptable verdict. They did so and returned with a verdict of guilty of the offence charged by a majority of 5 to 2. The learned judge concurred and convicted the appellant and sentenced him to death. On appeal the Federal Court held that the jury having delivered a verdict of guilty by a majority of 4 to 3 and such verdict having been duly recorded, it was thereafter *functus officio* and could not therefore be directed to reconsider and return a second verdict. The conviction was therefore quashed and as the trial itself was a nullity, a trial de novo was ordered.

The Federal Court in coming to that decision held that our Criminal Procedure Code contained no provision empowering the judge to direct a jury to retire and reconsider a verdict except as provided in s. 219(1) and presumably in s. 225 which read as follows:

> 219(1) If the jury are not unanimous, the judge may require them to retire for further consideration.
>
> 225. If the jury are unable to agree upon the verdict, the judge, alter such period as he considers reasonable, may discharge the jury.

It is to be noted that those two sections have been repealed as jury trial has since been abolished (see Act A908). This case is not relevant to the one before me. In the present case I have made a finding that since the Chemist had not testified as to the amount he had taken as sample for purposes of analysis, the court was unable to ascertain if the Chemist had complied with s. 37(da)(1) of the Act by taking the minimum amount. Further in a similar situation as in *PP v. Tan Hock Beng* [2002] 3 CLJ 177 I had sentenced the accused under s. 12(3) of the Act. Bearing in mind the need for consistency I therefore found the accused guilty under s. 12(3) of the Act and not under 39A(2) and sentenced him to a maximum of five years from date of arrest and further fined him RM20,000 in default 15 months imprisonment.